UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, DC

BETTEROADS ASPHALT CORP.,
a/k/a BETTEROADS ASPHALT, LLC

Respondent

and

Cases 12–CA–183927
12–CA–187042

VIRGIN ISLANDS WORKERS UNION

Charging Union

Ana B. Ramos - Fernandez, Esq.,
for the General Counsel.
Eugenio W.A. Geigel-Simounet, Esq.,
for the Respondent.

DECISION

I. STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. On April 13, 2018, the parties filed a joint motion for a decision based on a stipulated record. As part of the motion, the parties attached the exhibits referenced herein as GCX 1(a) to GCX 1(y), and JX 1 to JX (16). The parties stipulated to and agreed that: GCX 1(a) through 1(y) attached are the formal papers. GCX 1(y) attached, is an index and description of the formal papers. The Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, GCX 1(g), and the Answer to the Consolidated Complaint and Notice of Hearing, GCX 1(1), contain certain admitted relevant facts and conclusions of law that are not repeated in this stipulation.

On June 18, 2018, the parties' motion and stipulations were approved, and the exhibits are hereby admitted into evidence. (AJX 1.)[1] The parties have stipulated to the following facts regarding the filing of the charges in this matter: (1) The original charge in case 12-CA-183927 was filed by the Virgin Islands Workers Union (the Union/Charging Party) on September 9, 2016, and a copy was served on Betteroads Asphalt Corp., a/k/a Betteroads Asphalt LLC (Respondent) by U.S. mail on September 12, 2016. (GCX 1(a), GCX 1(b).); (2) The original

[1] AJX 1 is the order I issued on June 18, 2018, granting the parties motion and setting a briefing date. It is likewise admitted into evidence.

charge in case 12-CA-187042 was filed by the Union on October 26, 2016, and a copy was served on Respondent by U.S. mail on October 27, 2016. (GCX 1(c), GCX 1(d).); and (3) The first amended charge in case 12-CA-187042 was filed by the Union on December 28, 2016, and a copy was served on Respondent by U.S. mail on the same date. (GCX 1(e), GCX 1(f).)

The complaint alleges that (1) from about a date in August 2016, to on or about a date in October 2016, more precise dates being presently unknown, Respondent ceased paying the wages and benefits earned by employees in the Unit; and (2) on or about a date in mid-October 2016, a more precise date being presently unknown, Respondent ceased the operation of its plant located in St. Thomas, United States Virgin Islands, and terminated the employment of all employees in the Unit without prior notice and without affording the Union an opportunity to bargain with respect to this conduct and its effects on unit employees and without first bargaining with the Union to an overall good-faith impasse for an initial collective-bargaining agreement in violation of the Section 8(a)(1) and (5) of the Act.

Based on the entire record, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. JURISDICTION

The parties stipulated to the following facts on the nature of the Respondent's business and jurisdiction:

1. The Respondent is a Puerto Rico corporation duly authorized to do business in the United States Virgin Islands (USVI) and is engaged in the production and sale of asphalt, and the paving of roads. As part of its business operations, Respondent operated several manufacturing plants and/or facilities in Puerto Rico. In addition, Respondent operates a paving plant and facility in St. Thomas USVI.

2. During the 12-months period preceding October 6, 2016, in conducting its business operations described in paragraph 1 above, Respondent purchased and received at its facility in St. Thomas, USVI goods valued in excess of $50,000 directly from points located outside of the USVI.

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (NLRA/the Act).

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Background Facts

The parties stipulated to the following facts:

1. Respondent's facility at issue in this proceeding is the St. Thomas paving plant and facility (the St. Thomas facility) which is located at 3G Estate Bovoni, Turnpentine Run Road, St. Thomas, USV1. For many years, the USVI Government has been one of Respondent's main clients. During the period from October 2015 to October 2016, Respondent was contracted by the USVI Federal Highway Administration to perform road asphalt paving services in St. Thomas, USVI, including the work performed for Island Wide Pavement Rehabilitation in St. Thomas, under contract number VI-9999(122). (JX 14.)

2. At all material times, Respondent's daily operations at the St. Thomas facility were managed and supervised as follows: General Manager Eason Jeffers (Jeffers) was responsible for the assignment of work and supervision of Respondent's work force employed at the St. Thomas facility, including the unit employees. Jeffers reported to Operations Vice President Luis Perez-Duran (Perez-Duran), who was responsible for negotiating and administrating work projects performed by Respondent in USVI. Perez-Duran traveled regularly to the St. Thomas, facility. Human Resources Director Linette Orta (Orta) was responsible for the implementation and administration of company rules, employee benefits and all personnel matters for all of Respondent's work force employed at the facilities of Respondent, including the St. Thomas facility. Orta reported to work at Respondent's administrative offices in San Juan, Puerto Rico and traveled to the St. Thomas facility as needed. Perez-Duran and Orta reported directly to Respondent's President Jorge L Diaz (Diaz).

3. At all material time relevant to this proceeding, Jeffers, Perez-Duran and Orta possessed the authority on behalf of Respondent to engage in one or more of the following actions concerning employees at Respondent's St. Thomas facility: hiring, transferring, suspending, laying off, recalling, promoting, discharging, assigning work, rewarding, disciplining, scheduling or granting time off, assigning overtime, adjusting grievances, directing work, evaluating, and/or effectively recommend any of such actions.

4. At all material times relevant to this proceeding, and for the 12-month period ending on October 31, 2016, the following individuals have held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Jorge L. Diaz —President
Luis Perez Duran — Operation Vice-president
Eason Jeffers — General Manager
Linette Orta — Human Resources Department Director

5. At all material times, the Virgin Islands Workers Union (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

6. On May 5, 2016, a representation election was conducted in National Labor Relations Board (NLRB/the Board) Case 12-RC-173951, pursuant to a Stipulated Election Agreement, a copy of which is attached as JX 2. A majority of the valid votes in the election were cast for the Union, and on June 9, 2016, the Union was certified as the exclusive collective-bargaining representative of the employees in a unit of all production and maintenance employees of Respondent employed in the manufacture of asphalt in its plant located in St. Thomas USV1, including road crews; and excluding all the executive, administrative and professional personnel, office clericals and plant clerical employees, master mechanics, foremen, watchmen, time-keepers, buyers, guards and supervisors as defined in the Act (the Unit). A copy of the Certification of Representative in Case 12-RC-173951 is attached as JX 3.

7. The Unit described in paragraph 6 above constitutes a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9 (b) of the Act.

8. Since the issuance of the Certification of Representative on June 9, 2016, based on Section 9(a) of the Act, the Union has been the exclusive bargaining representative of the Unit. There has not been any collective-bargaining agreement reached between the parties.

9. Charlesworth Nicholas (Nicholas) is the President of the Union. He represented the Union during the representation proceedings in Case 12-RC-173951, and, as discussed below, he has been the bargaining spokesperson for the Union in negotiations with Respondent concerning the terms and conditions of employment of the employees in the certified Unit and concerning the plant closure of Respondent's St. Thomas facility.

10. Attorney Wilfredo Geigel (Geigel) represented Respondent during the period from June 2016 until October 2016. As discussed further, below, during this period, Geigel exchanged communications with the Union concerning the terms and conditions of employment of the employees in the Unit and for collective-bargaining purposes. Geigel also represented Respondent in dealing with the Union with respect to the closing of Respondent's St. Thomas facility, as it will be discussed below.

11. Since at least November 2016, and continuing until the present, Attorney Eugenio Geigel-Simounet (Geigel-Simounet) has been representing Respondent before the Board in this matter, Cases 12-CA-183927 and 12-CA-187042.

12. Geigel-Simounet is also representing Respondent in Case No. ST-16-CV-0610 before the Superior Court of the Virgin Islands, Division of St. Thomas and St. John, a case filed by the Government of the USVI against Respondent concerning the closure of Respondent's facility in St. Thomas. (JX 14 and JX 15.)

13. By letter dated June 10, 2016, the Union notified Respondent of the Board's Certification of Representative in Case 12-RC-173951 and requested the following information in preparation for collective-bargaining: 1) the names of all employees; 2) work classifications; 3) employees' wages; 4) dates of hire; and 5) benefits the employees were receiving. The letter was addressed to Jeffers, as General Manager for the St. Thomas facility, and was signed by Union President Nicholas. (JX 4.)

14. On June 20, 2016, Respondent replied to the Union's June 10, 2016 letter in writing, instructing the Union to direct all matters related to the unit employees employed at the St Thomas facility to Perez-Duran and Orta as the operations vice president and human resources director, respectively. Respondent provided the telephone numbers and email addresses for both representatives. The letter is addressed to Nicholas and is signed by Orta. (JX 5.)

15. On June 20, 2016, the Union sent a letter to Respondent reiterating the request for information referred to above in paragraph 13. In its June 20, 2016 letter, the Union stated that Respondent failed to pay unit employees a benefit due in May 2016, identified by the Union as "Mother's Day Bonus". In addition, the Union asked to meet with Respondent to discuss outstanding issues and to commence bargaining. The letter is addressed to Orta and Jeffers, and is signed by Nicholas. (JX 6.)

16. By letter dated June 22, 2016, Respondent answered that it was still gathering the information requested and that with regard to the payment of the benefit due in May, which Respondent referred to as "liquidation of sick leave," Respondent answered that due to its financial situation, the payment of said benefit would be paid to unit employees in two installments, with the first installment on July 24, 2016, and the second installment on October 14, 2016. Respondent's June 22, 2016 letter further states that all employees were notified about the arrangement and it instructs the Union to coordinate bargaining meetings with Geigel and provide contact information. The letter is addressed to Nicholas and is signed by Orta. (JX 7.)

17. In about the end of June and/or beginning of July 2016, Respondent provided the Union with the information sought in its letter dated June 10, 2016.

18. On about July 24, 2016, Respondent made the first installment payment to the unit employees of the benefit due in May 2016.

19. On July 12, 2016, Nicholas met with Geigel for the first time for an introductory meeting. The meeting took place at Geigel's law office in St. Croix. During that meeting, Geigel and Nicholas introduced themselves and exchanged general information. Geigel asked Nicholas to submit the Union's bargaining proposals in advance of the first collective-bargaining meeting.

20. During the first week of August 2016, the Union provided its proposal for the collective-bargaining agreement to Respondent. Geigel and Nicholas exchanged electronic mail communications on August 9, 2016. Geigel made reference to the draft of the proposed collective-bargaining agreement submitted by the Union. JX 8 shows the electronic mail communications between Geigle and Nicholas from August 9, 2016 through August 29, 2016 which pertains to several paragraphs of this stipulation.

21. The first bargaining meeting between Respondent and the Union was scheduled for August 10, 2016. However, the meeting was cancelled by Respondent because Orta was unavailable. The meeting was rescheduled to August 22, 2016. The electronic communications relevant to this paragraph are included in JX 8, as follows: (a) e-mail communication from Nicholas to Geigel dated August 9, 2016, sent at 11:54 a.m., requesting confirmation for the meeting of August 10, 2016; (b) reply from Geigel to Nicholas dated August 9, 2016, sent at

3:32 p.m., explaining that Orta's flight was cancelled and suggesting August 22 and/or 23, 2016 as available dates; (c) email dated August 11, 2016, from Nicholas to Geigel sent at 11:46 a.m., stating the Union's availability for August 22; (d) reply from Geigel to Nicholas dated August 11, 2016, sent at 12:13 p.m., confirming the meeting for August 22, 2016.

22. The meeting of August 22, 2016, took place at the office of Geigel in St. Croix. Nicholas and union secretary Sharon Gilberts (Gilberts) attended on behalf of the Union. Geigel and Orta attended on behalf of Respondent. After a brief discussion of the Union's proposal, Geigel stated that Respondent was planning to close its operations in St. Thomas, but there was no effective date at the time. He further explained that Respondent was working three projects and its plans were subject to the completion of those jobs, and that he intended to provide proper notices to the USVI Department of Labor in accordance with USVI Law. Nicholas asked Geigel to bargain over the closure of the operations and the effects of the closure. In addition, Nicholas asked to bargain over the payments owed to unit employees. Nicholas also told Respondent's representatives that unit employees were unable to cash their 'paychecks due to insufficiency of funds. Orta replied that Respondent was having some problems with the bank but it intended to pay the employees once the bank released its funds.

23. By email dated August 29, 2016, from Nicholas to Geigel, Nicholas asked that Respondent pay the aforementioned second installment for the unit employees' benefit owed by no later than September, 2016, or by Labor Day Holiday. (JX 8.)

24. By email dated August 29, 2016, Geigel replied to Nicholas that he was working hard to resolve the matter. (JX 8.)

25. By letter dated September 2, 2016, Respondent notified the Union that it was closing its operations due to its financial situation. According to the notification, Respondent was ceasing operations within 90 days, or when the pending projects were completed, whichever occurred first. Attached to the letter was a Notice to Employees from Respondent to its employees, including the unit employees, dated September 1, 2016. (JX 9, JX 10.)

26. On September 2, 2016, the Union, by Nicholas, called the office of Geigel, and was informed that he was in the hospital. By communication dated September 2, 2016, sent by email on that same date, Nicholas asked Respondent to meet and bargain with the Union over the plant closure, and again requested the payment of the second installment payment for the benefit owed since May 2016, by no later than September 9, 2017. (JX 11.)

27. By letter dated September 19, 2016, Nicholas protested the Respondent's failure to notify and bargain with the Union before informing certain employees on September 14, 2016, not to report to work on Thursday, September 15, and Friday, September 16, 2016. In the same letter, Nicholas complained about: the non-payment of wages owed to unit employees for the previous 3 weeks; Respondent's failure to reply to the Union's inquiries about the payments and plant closure; and Respondent’s refusal to reply to the Union’s pleas to meet in-person to discuss the aforementioned issues. (JX 12.)

28. Respondent did not respond to the union letters dated September 2, 2016, and September 19, 2016.

29. On September 30, 2016, Perez-Duran verbally notified the remaining unit employees employed at the St. Thomas facility that Respondent was ceasing operations and their employment was terminated effective immediately. This notification was communicated on a Friday and the employees were informed not to report to work the following Monday, October 3, 2016.

30. By letter dated October 6, 2016, Respondent further notified all of its employees employed at the St. Thomas facility, including all unit employees, about the conclusion of all operations in the USVI and their termination of employment. In that communication, Respondent admitted failing to comply with its payroll obligations. A copy of the letter dated October 6, 2016, to unit employee Phillip Steadroy (Steadroy) is attached as JX 13. Other than the name and address of the employee, JX 13 is the same as the October 6, 2016 letter that Respondent sent to all unit employees.

31. The only meetings between representatives of the Union and Respondent before the closing of the St. Thomas facility were the meetings on July 12, 2016, and August 22, 2016, as described above in paragraphs 19 and 22, respectively. In the beginning of 2017, about 3 months after the closing of the St. Thomas facility on September 30, 2016, Geigel-Simounet met with Nicholas and informed the Union that Respondent could not do anything else about the closing of the St. Thomas facility. Subsequently, during the months of February and March 2017, Geigel-Simounet engaged in several communications with Nicholas related to the mailing and/or distribution of the W-2 Forms to the unit employees.

32. Respondent contends that it was forced to cease operations due to its financial situation and has been unable to meet payroll obligations because Banco Popular (the bank) closed Respondents line of credit and froze all access to Respondent's accounts and funds. Respondent also claims that another contributing factor was that the Department of Public Works of the USVI failed to make certain payments to Respondent for project phases allegedly completed.

33. Respondent has failed to make the second installment payment to unit employees for the benefit owed in May 2016, which Respondent had promised to pay to the unit employees on October 14, 2016.

34. At all material times, following the unit employees were employed by Respondent at its St. Thomas facility. The corresponding wage rate for each employee as of September 30, 2016, appears opposite their respective names:

Name	Wage rate
1. Cleave Simon	$15.00
2. Edwards Terry	$12.50
3. Hensen Keith	$19.50
4: Joseph Steve	$13.00
5. Kelbert, Frank	$16.00
6. Olive Andrew	$17.50
7 Phillip Steadroy	$13.80

8. Robersind Joseph	$15.00
9. Selkridge Vincent	$14.50
10. Stevens Gleamore	$13:50
11 Todman Devaugh	$16.50
12. Williams Clement	$15.00

35. Respondent has failed to pay unit employees, including the employees listed above in paragraph 34 and any other unit employees who were laid off or terminated by Respondent on or after August 22, 2016, for the wages owed for work performed during the period from August 22, 2016, through September 30, 2016. Respondent has also failed to pay the accrued sick leave and annual leave owed to those employees.

36. Respondent admits owing wages earned to unit employees for work performed during the period from August 22, 2016, through September 30, 2016.

37. Respondent admits owing unit employees pay for sick leave and annual leave that was accrued as of their last day of employment with Respondent during September 2016.

38. As referred to above in paragraph 12, the claim filed in Case ST-16-CV-610 by the Government of the Virgin Islands on behalf of the Virgin Islands Commissioner of the Department of Labor before the Virgin Islands Superior Court (herein referred to as the Claim), arises pursuant to the Virgin Islands Plant Closing Act, Tittle 24 V.I. Code Ann. Sections 417-476, which in essence, provides that every employer closing a facility shall, at least 90 days prior to closing, provide advance notification to the Commissioner of Labor, any affected employees, and, if the employees are represented by a Labor Union, to such Union. The statue defines Plant Closing as, "a permanent cessation or reduction of business at a facility which results or will result, as determined by the Commissioner, in the permanent separation of at least 50 percent of the employees of said facilities within a period of six months to the date of actual or anticipated termination of business or within such other period as the Commissioner shall prescribe, provided that such period shall fall within the six month period prior to the date of actual or anticipated termination of Business. Plant closing shall not include facilities which are closed under provisions of the Federal Bankruptcy Act, 11 USC 101 et seq., except for employers in reorganization proceedings and facilities closed due to physical calamity or natural disaster. Within one pay period after termination the employer shall pay each affected employee a severance payment equal to one week's pay for every year of service. Severance pay for employees who have worked less than one year shall be prorated over a one-year period, provided that the Union shall have the right to negotiate for additional benefits for its membership." (JX 14 and JX 15.)

39. As part of the claim proceedings in Case ST-16-CV-610, Respondent executed an authorization for the transfer and disbursement of contract Funds. Pursuant to said document, Respondent authorized the Federal Highway Administration (FHA) to transfer to the U.S. Department of Labor funds in the amount of $113,386.34 from contract payments to be disbursed to satisfy the payment of wages to Respondent's employees, including unit employees. (JX 16.) To date, and to the best of the knowledge of Respondent, FHA has not released the funds to the USVI Department of Labor. Proceedings related to the claim remain pending before the USVI Superior Court and no disbursement has been awarded, or issued to the unit

employees. Pursuant to said case, unit employees have not received severance payments, or payment for wages or benefits owed by Respondent, or payment for accrued sick and annual leave owed by Respondent.

40. The parties are aware of the claim in Case ST-16-CV-610 before the Virgin Islands Superior Court. In the event, that all and/or part, of the unpaid salaries that Respondent owed the unit employees listed above in, paragraph 34 for work performed during the period of August 22, 2016, to September 30 2016, and/or for the liquidation of sick leave and annual leave, be paid though said proceeding, such amounts would be considered by the Board as part of the compliance procedures in Cases 12-CA-183927 and 12-CA-187042, as applicable.

In their joint motion for a decision on a stipulated record, the parties also stipulated that the only meetings and communications exchanged by Respondent and the Union that are relevant to this case are those described in this Joint Motion. Moreover, the parties stipulated that they will argue the appropriateness of remedies in their briefs to the Administrative Law Judge.

III. LEGAL ANALYSIS

A. Respondent Ceased Paying Wages and Benefits to Its Employees

The General Counsel argues that from on or about August 2016 to on or about October 2016, Respondent acted unilaterally by failing to notify the Union or giving it a "meaningful opportunity" to bargain prior to ceasing the payment of wages and benefits to its employees in violation of the Act. More specifically, since August 2016, Respondent failed to pay unit employees the second installment a "Mother's Day Bonus" or as referred to by Respondent, "liquidation of sick leave."[2] Respondent counters that the evidence shows it acted in "good faith" by authorizing the Federal Highway Administration (FAA) to transfer United States Department of Labor (DOL) funds it held for Respondent to be given to Respondent's employees to satisfy the payment of wages and benefits owed to them by Respondent.

An employer may not change the terms and conditions of employment of represented employees without providing their representative with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962). "Under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes." *Lawrence Livermore National Security*, *LLC*, 357 NLRB 203, 205 (2011). The duty to bargain, however, only arises if the changes are "material, substantial and significant." *Alamo Cement Co.*, 281 NLRB 737, 738 (1986); *Flambeau Airmold Corp*., 334 NLRB 165, 171 (2001). The General Counsel bears the burden of establishing this element of the *prima facie* case. *North Star*

[2] Although the Union refers to the benefit as "Mother's Day Bonus" and Respondent refers to it as "liquidation of sick leave", it is undisputed that the parties are referencing the same benefit. Consequently, throughout the decision, I will refer to this benefit as the "bonus/liquidation" payment for purposes of conciseness and clarity.

Steel Co., 347 NLRB 1364, 1367 (2006). In order to find that an employer made unilateral changes to an employee benefit in violation of the Act, it must be shown that (1) material changes were made to the employees' terms and conditions of employment; (2) the changes involved mandatory subjects of bargaining; (3) the employer failed to notify the union of the proposed changes; and (4) the union did not have an opportunity to bargain with respect to the changes. *San Juan Teachers Assn*., 355 NLRB 172, 175 (2010). *Alamo Cement Co.*, at 738; *Flambeau Airmold Corp.*, supra; *Garden Grove Hospital & Medical Center*, 357 NLRB 653, 653 fn. 4, 657 (2011).

An employer to a contractual agreement may unilaterally take certain actions that result in changes to the terms and conditions of employment if there has been a "clear and unmistakable" waiver of the Union's right to bargain over the changes. *Pavilions at Forrestal*, 353 NLRB 540 (2008) (impasse irrelevant where employer unilaterally implemented new health insurance plan without providing union information, notice and opportunity to bargain concerning new plan); *Laurel Bay Health & Rehabilitation Center*, 353 NLRB 232 (2008) (employer prematurely declared impasse and unilaterally implemented changes in health insurance and other benefits where union requested and employer agreed to schedule subsequent bargaining session, union indicated willingness to "look at other plans," and union stated that it would prepare counterproposal). The "clear and unmistakable" standard requires that the contract language is specific, or it must be shown that the subject alleged to have been waived was fully discussed by the parties and the party alleged to have waived its rights did so explicitly and with the full intent to release its interest in the matter. *Allison Corp.*, 330 NLRB 1363, 1365 (2000); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). There is no contention or evidence that the Union waived its right to bargain over the matter at issue.

Based on the record of evidence, I find that from August 2016 to on or about October 2016, Respondent unilaterally ceased paying wages and, or bonus/liquidation payments without providing the Union with notice or an opportunity to bargain in violation of the Act.

In *Axelson, Inc.,* 234 NLRB 414, 415 (1978), the Board defined mandatory subjects of bargaining as,[3]

> those comprised in the phrase "wages, hours, and other terms and conditions of employment" as set forth in Section 8(d) of the Act. While the language is broad, parameters have been established, although not quantified. The touchstone is whether or not the proposed clause sets a term or condition of employment or regulates the relation between the employer and its employees.

Wages and benefits are considered mandatory subjects of bargaining. 29 U.S.C. § 158(d); See *Also NLRB v. Frontier Homes Corp.*, 371 F.2d 974, 978 (8th Cir. 1967). Wages have been defined broadly by the courts and the Board. *Waxie Sanitary Supply*, 337 NLRB 303, 304 (2001) (holding that a holiday bonus is a mandatory bargaining subject if employer's conduct raises the employees' reasonable expectation that the bonus will be paid); *Laurel Bay Health & Rehabilitation Center* (merit increase is a mandatory subject of bargaining); *Mining Specialist*

[3] *Operating Engineers Local 12 (Association General Contractors of America, Inc.*) 187 NLRB 430, 432 (1970).

(Mining Specialists III), 335 NLRB 1275, 1283 (2001), enfd. 326 F.3d 602 (4th Cir. 2003)[4] ("bonus was a mandatory subject of bargaining since it was compensation for services rendered and not a gift"); *NLRB v. Katz*, supra at 746 (merit wage increase is a mandatory subject of bargaining).

The evidence is undisputed that the employees' wages are mandatory subjects of bargaining. Moreover, it is apparent that Respondent's failure to pay the October 14, 2016, installment of the bonus/liquidation payment involves wages and, therefore, is included in the definition of mandatory subjects of bargaining. By unilaterally ceasing payment of wages and the bonus/liquidation payment, Respondent's actions have significantly impacted the union's ability to represent its unit employees in disputes that are "those most essential of employee concerns—rates of pay, wages, hours, and conditions of employment." *Arizona Portland Cement Co.,* 302 NLRB 36, 44 (1991). In implementing the unilateral change at issue, the bargaining unit employees lost a portion of their wages and benefits. I therefore find that the changes are material, substantial and significant. Unless a valid impasse has been reached, an employer cannot make unilateral changes to the terms and conditions of employment. *Newcor Bay City Division,* 345 NLRB 1229, 1237 (2005) (defining a bargaining impasse as the "situation where 'good-faith negotiations have exhausted the prospects of concluding an agreement).

Next, I turn to the questions of whether the Union was provided with notice of the changes and a reasonable opportunity to bargain. The Board has held that for notice to be effective and timely, it must be precise about future plans and timing; and "afford the union a reasonable opportunity to evaluate the proposals and present counter proposals" before implementation. *Pan American Grain Co*., 343 NLRB 318, 318 (2004), vacated, 448 F.3d 465 (1st Cir. 2006), reaffirmed 351 NLRB 1412 (2007); see also *Gannett Co*., 333 NLRB 355, 357 (2001); *UAW-DaimlerChrysler National Training Center*, 341 NLRB 431, 433 (2004); *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982). A union has a responsibility to demand bargaining only when the employer has made "a clear announcement that a decision affecting the employees' terms and conditions of employment has been made and that the employer intends to implement this decision." *Oklahoma Fixture Co.*, 314 NLRB 958, 960-961 (1994), enf. denied 79 F.3d 1030 (10th Cir. 1996). *Centurylink*, 358 NLRB 1192, 1193 (2012), appeal dismissed, 2014 WL 1378759 (D.C. Cir. 2014); *San Juan Teachers Assn*., 355 NLRB 172, 176 (2010). Once an employer communicates to the union a clearly stated decision that it intends to implement at a specific time, the union is considered to have received timely notice of that change. *Sierra International Trucks*, 319 NLRB 948, 950 (1995).

The evidence is undisputed that the employees were scheduled to receive a bonus/liquidation payment in May 2016. However, it was not until ***after*** Respondent failed to make the May 2016 payment that the Union, through its members, learned of the non-payment. It is therefore undeniable, and I find, that Respondent did not provide the Union with notice and an opportunity to bargain prior to the implementation of Respondent's decision to delay the distribution of the May 2016 the bonus/liquidation payment and pay it in two installments on July 24 and October 14, 2016.

[4] The Board's Decision and Order in the underlying unfair labor practice proceeding in the case is reported at 314 NLRB 268 (1994) (*Mining Specialist I*). The Board's initial Supplemental Decision and Order in the compliance proceeding is reported at 330 NLRB 99 (1999) (*Mining Specialist II*).

By letter dated June 20, 2016, Nicholas sent Jeffers, via Respondent's human resources director, a demand that Respondent fulfill its obligation to make the bonus/liquidation payment to its eligible employees. (JX 6.) On June 22, 2016, Respondent answered that because of its financial situation, instead of awarding the bonus/liquidation in one payment as scheduled for May 2016, it would distribute the payments in two installments on July 24 and October 14, 2016. In the letter, Respondent stated that it had "already notified our employees" that the payments would be distributed in two installments. Based on the overall contents of the letter, it is clear that Respondent implicitly acknowledges it did not notify the Union of its unilateral change to the bonus/liquidation payment prior to its implementation. Although Respondent directed the Union to contact its attorney, Wilfredo Geigel, for "negotiation on this matter", it is unclear whether Respondent is referencing negotiation on the delay of bonus/liquidation payment, the division into two installments of the bonus/liquidation payment, the Union's request for information, or the collective-bargaining agreement (CBA). (JX 7.) Regardless, it is apparent that negotiation over the division of the bonus/liquidation payment into two installments, with the first disbursement on July 24, 2016 and the second to be made on October 14, 2016, was moot at that point because Respondent had already unilaterally implemented the change without notifying or bargaining with the Union prior to the change. Respondent made the July 24 payment but failed to notify or negotiate with the Union over its nonpayment of the October 14 bonus/liquidation payment. The evidence unequivocally establishes that the Union did not learn until *after* the actions had been taken that Respondent had divided the bonus/liquidation payment into two installments, delayed making the payments for several months after their original scheduled disbursement date, and ultimately defaulted on the second installment (October 14) of the bonus/liquidation payment. Consequently, there was no opportunity for the Union to bargain because the actions were fait accompli. See *Ciba Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982 enf. 722 F.2d 1120 (3rd Cir. 1983) (if notice was too short a time before implementation or because employer has no intention of changing its decision, then notice is nothing more than informing the union of a fait accompli); *Intersystems Design & Technology Corp*., 278 NLRB 759 (1986) quoting *Gulf States Mfg. Inc. v. NLRB*, 704 F.2d 1390, 1392 (5th Cir. 1983) (employer gave the union no opportunity to bargain before the layoffs, thus decision presented as a fait accompli); *Gannett Co*., 333 NLRB 355, 359 (2001) (union presented with a fait accompli because sale of company implemented prior to giving union opportunity for effects bargaining).

Likewise, I find that Respondent did not notify and give the Union an opportunity to bargain prior to ceasing the payment of wages to its employees. It is undisputed that on July 12, 2016, the Union President, Nicholas, and Respondent's attorney, Geigel, met for the first time to introduce themselves and exchange general information. There is no evidence that at this meeting Respondent informed the Union that it would cease paying its employees' wages in August 2016 or at any point. Despite a series of attempts on the part of the Union beginning on or about August 9, 2016, to schedule a bargaining session, the first in-person negotiation was not held until August 22, 2016. Until that point, there is no evidence that Respondent notified the Union it would cease paying its employees' wages effective August 22 through September 30, 2016. On the contrary, at the August 22, 2016, bargaining session Respondent told the Union for the first time that it planned to close its operations in St. Thomas but did not have an effective date for the closure. At which point, the Union requested Respondent bargain over the effects of the closing, and the nonpayment of the final installment of the bonus/liquidation payment and

wages. Thereafter, the Union made several requests to bargain over Respondent's failure to pay the employees' wages and the final installment of the bonus/liquidation but Respondent either made false promises to pay the benefits owed, reiterated its intention to close the facility, or ignored the requests altogether.

Based on the undisputed facts, I find it is clear Respondent did not notify and give the Union an opportunity to bargain prior to ceasing payment of the employees' wages and its failure to make the final installment of the bonus/liquidation payment. There is no evidence that Respondent presented its decisions to the Union as anything less than a fait accompli.

Accordingly, I find that from about August 1, 2016 to on or about October 1, 2016, Respondent ceased paying the wages and benefits earned by employees in the Unit without notifying the Union and affording the Union an opportunity to bargain in violation of Section 8(a)(1) and (5) of the Act.[5]

B. Respondent Ceased Operation and Terminated Its Employees

The General Counsel argues that on or about a date in mid-October 2016, Respondent ceased the operation of its plant located in St. Thomas, and terminated the employment of all employees in the Unit without prior notice and affording the Union an opportunity to bargain over the nonpayment of wages and the effects of the closure. The Respondent counters that the evidence shows it acted in "good faith" by authorizing the Federal Highway Administration (FAA) to transfer United States Department of Labor (DOL) funds held for the Respondent for contract payment to be given to its employees to satisfy the payment of wages and benefits owed to them by the Respondent.

In *First National Maintenance Corp. v. NLRB*[6] the Supreme Court held that bargaining over the effects of a decision to partially close a business is a mandatory subject of bargaining. Moreover, the Union has to be given sufficient notice and the bargaining must be "conducted in a meaningful manner and at a meaningful time." See also *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1039 (8th Cir. 1976) ("an employer, although under no duty to bargain regarding his decision to close a plant, must nonetheless * * * bargain with the Union in good faith over those areas which are affected by such decisions."). The Board has held that timely notice must be given sufficiently in advance of the closure to allow for "the exchange of information and proposals, and review of those proposals at a time when the Union still has leverage to bargain." *International Bridge and Iron Company*, 357 NLRB 320, 322 (2011). The Board has consistently held that "[e]ffects bargaining must occur sufficiently before actual implementation of the decision so that the union is not presented with a fait accompli." *Komatsu America Corp.*, 342 NLRB 649, 649 (2004). Moreover, the Union will not be found to have waived its right to effects bargaining "where the employer simply announces and implements changes as if it had

[5] Since the General Counsel failed to allege a date(s) more specific than "August 2016, to on or about a date in October 2016" for the unfair labor practice, I have placed the occurrences on dates most favorable to Respondent. See *State Plaza Hotel*, 347 NLRB 755, 772 (2006) (using, "May 1, 2003, the approximate date of the first unfair labor practice found herein.").

[6] 101 S.Ct. 2573, 2582 (1981).

no obligation to bargain over the effects of the changes." See *Naperville Jeep/Dodge*, 357 NLRB 2252, 2272 (2012), and cases cited therein, enfd. *Dodge of Naperville v. NLRB*, 796 F.3d 31 (D.C. Cir. 2015), cert. denied 136 S.Ct. 1457 (2016).

Respondent argues that (1) the Union was provided with adequate notice that Respondent planned to close its St. Thomas, USVI facility; and (2) Respondent bargained in good faith with the Union "as it pertains to the plant closure." (R. Br. 4.) Specifically, Respondent contends that it gave the Union sufficient advanced notice when (1) in a meeting on August 22, 2016, Respondent advised the Union that it was planning to close its St. Thomas facility; (2) by letter dated September 2, 2016, Respondent informed the Union that because of financial difficulties it would cease operations at and close the St. Thomas facility within 90 days or when pending projects were completed, whichever occurred first; and (3) on September 30, 2016, Respondent verbally notified its remaining employees that Respondent was ceasing operations, their employment was terminated with immediate effect, and they were not to report to work on October 3, 2016. Moreover, Respondent argues that it was forced to close and terminate the unit employees at issue because of an "involuntary bankruptcy petition filed by some of its creditors" which negates any argument that it acted in bad faith or refused to bargain collectively over the effects of the closure. (R. Br. 4.)

I find Respondent's arguments unpersuasive. Despite Respondent's assertion to the contrary, I find that in the meeting with the Union on August 22, 2016, Respondent did not provide adequate advance notice of its decision to close the plant and terminate the unit employees. During the meeting, Geigel informed Nicholas that Respondent planned to close its St. Thomas plant but "there was no effective date at the time." He went on to note that Respondent's plans were contingent on the completion of three ongoing projects it was currently working to finish. Likewise, I find that the September 2, 2016, notice Respondent gave the Union lacked the legally required specificity. See *Pan American Grain Co*., supra at 318; *Ciba-Geigy Pharmaceutical Division*, supra at 1017. Respondent's pronouncements to the Union that it intended to close and terminate Unit employees at some uncertain date in the future is devoid of the precision required under Board law. An employer's notice of its decision to partially close its business is legally inadequate if it is given too short of a time before implementation or if the decision and its effects has been presented as a fait accompli. *Bridon Cordage, Inc*., 329 NLRB 258, 259 (1999). In the matter at hand, it would have been impossible for the Union to determine how much time in advance of the closure that the Union had to bargain because Respondent's timeline was so vague. Regardless, the evidence shows that at least three times after being notified by Respondent that it planned to close the plant at some unspecified time in the future, the Union requested effects bargaining which Respondent ignored.

Even assuming the notice was adequate, the evidence is clear that by letters dated September 2, 2016 and September 19, 2016, the Union then requested to bargain over the effects of the plant closure but Respondent failed to respond. (JX 1, Stipulations 32, 33, 34, 37.) When told in the August 22, 2016, meeting of Respondent's intent to close the plant, the Union also requested at that time to bargain over the effects of the closure. Finally, Respondent's verbal notice to its remaining employees on September 30, 2016, was not timely because it was not delivered to the Union but rather directly to the employees; and the employees were informed that their termination was with immediate effect, thus presenting the decision as a fait accompli.

Brannan Sand & Gravel, 314 NLRB 282, 282 (1994); *Ciba Geigy Pharmaceutical Division* at 1017–1018.

I find equally unpersuasive Respondent's argument that it acted in good faith which relieves it of any legal liability. According to Respondent, there are two factors which support a finding that it acted in good faith and thus is exempted from liability or effects bargaining: (1) the catalyst leading to the closure of the plant was "beyond the control of both parties in this case"; (2) and Respondent authorized the FHA to transfer DOL funds owed to it to be dispersed to employees in satisfaction of wages and benefits payments.[7] (R. Br. 4, 6.) Contrary to Respondent's argument, the issue is not whether Respondent ***acted*** in good faith, but rather whether Respondent ***bargained*** in good faith. The answer is clearly no. Respondent insists that it met its legal obligation as early as August 22, 2016, when Respondent told the Union that it was closing the plant at some unspecified date in the future. As previously noted, I found this did not meet the legal requirement for timely notice, and even if it did the Union made several requests to bargain over the effects of the plant closure which Respondent repeatedly ignored. Moreover, on September 30, 2016, Respondent implemented its decision to close the plant and immediately terminated the remaining unit employees without informing the Union or responding to its requests for effects bargaining.

Likewise, I reject Respondent's arguments that its forced bankruptcy and the forfeiture of its DOL held funds to pay wages and benefits owed to its employees, excuses it from bargaining with the Union to impasse or agreement over the effects of its plant closure. Respondent's argument is confusing. According to Respondent, it gave adequate advanced notice and engaged in collective bargaining with the Union over the effects of the plant closure, both before and after the closure. I previously found that Respondent did not give sufficient notice nor engage in effects bargaining with the Union. Moreover, although Respondent contends that due to the involuntary bankruptcy its "hands were tied" over what it could do to satisfy the Union's demand, therefore implying that the parties had bargained to an impasse, there is no evidence in the record to support this assertion. The record contains nothing more than a stipulation that at some unspecified period, Respondent's bank closed its line of credit and froze access to the account and any funds therein. However, there is nothing in the record to establish how the bank's action prohibited Respondent from negotiating with the Union over the effects of the closure. Did Respondent have a line of credit with other financial institutions? Did Respondent have access to funds from other accounts? Did Respondent attempt to negotiate in the bankruptcy proceedings a plan whereby its affected employees could receive some or all of their owed wages and benefits? These are only a few questions that remain unanswered which preclude Respondent from successfully arguing that it was suffering from a serious financial emergency that exempted it from engaging in effects bargaining with the Union.

Moreover, the Board has held that economic circumstances similar to those suffered by Respondent do not necessarily relieve it of its obligation to bargain. The Board has long recognized "extraordinary events which are 'unforeseen occurrences, having a major economic effect [requiring] the company to take immediate action'" as a reason an employer may be

[7] In its brief, Respondent's argument was difficult to follow but I believe Respondent was attempting to argue that it was exempt from liability because of economic exigencies and its agreement to disburse to employees the money that was held in a fund by DOL which was owed to Respondent.

exempt from engaging in collective bargaining. *RBE Electronics*, 320 NLRB 80, 81 (1995). The employer bears the burden of proving there is an economic emergency which allows for an exception. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994). *Compact Video Services*, 319 NLRB 131 fn. 1 (1995). Respondent failed to establish that it met the criteria. The Board has held that financial circumstances similar to those Respondent experienced do not justify unilateral action and are not "sufficiently compelling to excuse bargaining." *RBE Electronics* at 81 ("economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action"). The record shows that as early as June 22, 2016, Respondent was well aware that it was experiencing financial difficulties which hindered its ability to fully meet its financial obligations to the unit employees. Further, it was slightly more than a month after Respondent first notified the Union of its intention to close the plant before it ceased operations and terminated the employees. It is clear, therefore, that Respondent's economic position was not so dire that it had to take immediate action. On the contrary, the evidence proves that Respondent had more than a month to engage in meaningful effects bargaining and "afford the union a reasonable opportunity to evaluate the proposals and present counter proposals" before ceasing operations and terminating the employees. *Pan American Grain Co*. at 318.

Respondent also failed to show that it met the factors necessary to establish that the parties had bargained to impasse. The Board has held that some of the factors to consider in determining whether an impasse has been reached are bargaining history of the parties, good faith, length of negotiations, importance of issues where the parties disagreed, and contemporaneous understanding on the status of negotiations. *Taft Broadcasting Co*., 163 NLRB 475 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Circuit 1968). The record is devoid of a bargaining history between the parties; I found there were no negotiations because Respondent failed to respond to the Union's entreaties to engage in effects bargaining; and since negotiations never occurred, logically there could be no agreement on the state of negotiations or issues over which the parties disagreed. Instead of negotiating to impasse, Respondent sidestepped the Union and on September 19 and 30, 2019, informed the unit employees directly that they should not report to work and were terminated effective immediately. Last, the fact that Respondent agreed to forego the money owed to it under several contracts and allowed DOL to give that money to the employees in satisfaction of their owed wages and benefits is irrelevant to whether Respondent bargained over the effects of the plant's closure.

Accordingly, I find that on about October 15, 2016, Respondent ceased the operation of its plant located in St. Thomas, United States Virgin Islands, and terminated the employment of all employees in the Unit without prior notice and without affording the Union an opportunity to bargain with respect to this conduct and its effects on unit employees and without first bargaining with the Union to an overall good-faith impasse for an initial collective-bargaining agreement in violation of the Section 8(a)(1) and (5) of the Act.[8]

[8] Since the General Counsel failed to allege a date more specific than "mid-October 2016" for the unfair labor practice, I have placed the occurrence on a date most favorable to Respondent. See *State Plaza Hotel*, supra.

CONCLUSIONS OF LAW

1. Respondent, Betteroads Asphalt Corp., a/k/a Betteroads Asphalt, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Virgin Islands Workers Union is a labor organization within the meaning of Section 2(5) of the Act and serves as the labor representative of Respondent's employees in the following bargaining unit:

> All production and maintenance employees of the Employer employed in the manufacture of asphalt in its plant located in St. Thomas USVI, including road crews; excluding all executive, administrative and professional personnel, office clerical and plant clerical employees, master mechanics, foremen, watchmen, time-keepers, buyers, guards and supervisors as defined in the Act.

3. By failing and refusing to pay the wages and benefits (bonus/liquidation payment) earned by employees in the Unit from August 1, 2016 to October 1, 2016, Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing employees' terms and conditions of employment without affording the Union a good-faith opportunity to bargain.

4. By failing and refusing to engage in effects bargaining over the closure of Respondent's plant in St. Thomas USVI and the termination of unit employees on October 15, 2016, Respondent violated Section 8(a)(1) and (5) of the Act.

5. The aforementioned unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily ceased paying the bonus/liquidation payment and wages owed unit employees, reinstate the wages and bonus/liquidation payment to unit employees and make them whole for any loss of earnings and other benefits they suffered as a result of the discrimination against them from the date of the discrimination to the date remedy is effectuated. The Respondent must also bargain in good faith with the Union, on request, over the effects of its decision to close its St. Thomas USVI plant, and reduce to writing and sign any agreement reached as a result of bargaining.

Under *Transmarine* analysis, as clarified in *Melody Toyota*, the standard remedy for effects bargaining is a limited make-whole relief. *Transmarine Navigation Corp*., 170 NLRB 389 (1968); *Melody Toyota*, 325 NLRB 846 (1998); *Rochester Gas & Electric Corp*., 355 NLRB 507, 508 (2010). The remedy set forth in *Transmarine* requires an employer to provide employees with limited backpay from 5 days after the date of the decision until the earliest of

one of four conditions. See *Transmarine Navigation Corp*., supra at 390. Specifically, Respondent must pay backpay at the rate of unit members' normal wages from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following: (1) the parties bargain to an agreement about the effects of Respondent's decision to close the business and terminate unit employees; (2) a bona fide bargaining impasse; (3) failure of the Union to request bargaining within 5 days after receipt of this Decision and Order or to start negotiations within 5 days after notice of Respondent's request to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith; but in no event will the sum paid to the unit employees exceed the amount the employees would have earned as wages from October 15, 2016 when the employees were terminated because Respondent closed its plant in St. Thomas USVI, to the time the employees secured equivalent elsewhere; provided, however, that in no event will this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last employed by Respondent. See *Transmarine Navigation Corp*., supra at 390; *Champaign Builders Supply Co. and Teamsters Local Union No. 26*, 361 NLRB 1382, 1387 (2014).

Backpay, because of the unlawful unilateral act of eliminating the bonus/liquidation payment and failing to pay wages owed to unit employees, shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as provided in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

Respondent, Betteroads Asphalt Corp., a/k/a Betteroads Asphalt, LLC, Commonwealth of Puerto Rico and in the United States Virgin Islands, its officers, agents, successors, and assigns, shall cease and desist from

(a) Ceasing to pay the final installment of the bonus/liquidation payment and failing to pay wages owed to unit employees or making other changes to the terms and conditions of employment of unit employees as previously defined, without first notifying the Union and giving the Union the opportunity to bargain.

(b) Failing to notify the Union, Virgin Island Workers Union, and give it an opportunity to bargain over the effects of the decision to close its plant on October 15, 2016.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of request by the Union, make employees in the bargaining unit, as previously defined, whole by paying them the final installment of the bonus/liquidation payment and wages owed to them that should have been paid on October 14, 2016 and from August 1, 2016 to October 1, 2016, respectively, with interest computed in accordance with Board policy, to the extent the Respondent has not already done so.

(b) On request, bargain with the Union as the exclusive representative of the employees in the appropriate unit, as previously defined, concerning the effects of the decision to close the St. Thomas USVI plant and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees of the Employer employed in the manufacture of asphalt in its plant located in St. Thomas USVI, including road crews; excluding all executive, administrative and professional personnel, office clerical and plant clerical employees, master mechanics, foremen, watchmen, time-keepers, buyers, guards and supervisors as defined in the Act.

(c) Pay its former unit employees backpay at the rate of the unit members' normal wages from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following: (1) the parties bargain to an agreement about the effects of Respondent's decision to close the business and terminate unit employees; (2) a bona fide bargaining impasse; (3) failure of the Union to request bargaining within 5 days after receipt of this Decision and Order or to start negotiations within 5 days after notice of Respondent's request to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith; but in no event will the sum paid to the unit employees exceed the amount the employees would have earned as wages from October 15, 2016 when the employees were terminated because Respondent closed its plant in St. Thomas USVI, to the time the employees secured equivalent elsewhere; provided, however, that in no event will this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages, with interest, as set forth in the remedy portion of this Decision and Order.

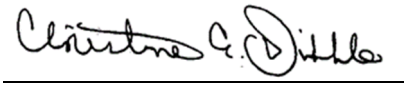
(d) File a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and compensate former unit employees for any adverse tax consequences of receiving lump-sum backpay awards.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, Respondent shall duplicate and mail, at its own expense and after being signed by Respondent's authorized representative, copies of the attached notice marked "Appendix"[10] to the Union and to all unit employees who were employed by Respondent at any time since August 1, 2016.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. January 22, 2019



Christine E. Dibble (CED)
Administrative Law Judge

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
Notice to Employees
Mailed By Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union;
Choose a representative to bargain with us on your behalf;
Act together with other employees for your benefit and protection;
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Virgin Island Workers Union as the exclusive collective-bargaining representative of our former employees in the following appropriate unit at our St. Thomas USVI plant:

All production and maintenance employees of the Employer employed in the manufacture of asphalt in its plant located in St. Thomas USVI, including road crews; excluding all executive, administrative and professional personnel, office clerical and plant clerical employees, master mechanics, foremen, watchmen, time-keepers, buyers, guards and supervisors as defined in the Act.

WE WILL NOT fail or refuse to pay your wages, your bonus/liquidation payment, or make any other changes to the terms and conditions of employment of our employees in the above unit, without prior notice to the Union and without affording the Union an opportunity to bargain with us with respect to this conduct and the effects of this conduct.

WE WILL NOT close our operations and terminate our bargaining unit employees without first giving the Union legally sufficient notice and an opportunity to bargain with us with respect to the effects of this conduct.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL make whole all employees in the above described unit by payment to them of their unpaid wages and bonus/liquidation payment earned in 2016, less statutory deductions, plus interest.

WE WILL compensate our employees in the above described unit for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 12, a report allocating the backpay award to the appropriate calendar year.

WE WILL bargain collectively with the Union as the exclusive collective-bargaining representative of our employees in the above-described bargaining unit concerning wages and benefits and other terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

Betteroads Asphalt Corp., a/k/a Betteroads Asphalt, LLC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

National Labor Relations Board, Subregion 24
525 F.D. Roosevelt Avenue
LaTorre de Plaza, Suite 1002
Telephone: (787) 766-5347
TTY: (866) 315-6572
Hours of Operation: 8:30 a.m. to 5:00 p.m. ET

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-183927 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (787) 766-5225.